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No. 01-518

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BE&K CONSTRUCTION CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

The Chamber of Commerce of the Unites States of America ("the Chamber") is the world's largest federation of business companies and associates, with an underlying membership of nearly 3,000,000 businesses and professional

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no persons other than the *amici curiae*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed with the Clerk of the Court simultaneously with the filing of this brief.

organizations of every size, in every industry sector, and every region of the country. An important function of the Chamber is to represent the interests of its members by filing briefs *amicus curiae* in cases involving issues of concern to American business. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance the interests of its members by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.

The Associated Builders and Contractors, Inc. ("ABC") is an association of more than 23,000 construction contractors and related firms. Many of ABC's members are "merit shops," that is, they do not regularly operate under collective bargaining agreements with unions. When bidding for contracts in competition with unionized competitors, ABC members have been confronted by activities of labor organizations and their agents with the purpose, or effect, of removing them from competition. They often face, as here, repetitive lawsuits and other tactics which increase their costs or persuade their customers to select other contractors. ABC's members have a fundamental business interest in their business reputations and in seeking judicial determination of their rights. ABC actively represents the interests of its member-employers in a wide variety of labor and employment matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.

Courts are the approved forum for resolving conflicting interests and resulting disagreements; and the First Amendment to the Constitution protects the right to petition the courts. This case presents the issue whether petitions by employers to courts for redress against union and employee

conduct is entitled to a lesser level of constitutional protection than that accorded non-union parties, employees, and other persons. The issue is of vital concern to both the Chamber and ABC, and to their respective constituent employers, many of whom petition courts for relief against union or employee conduct that is arguably unlawful, or is legally unprotected. *Amici* assert therefore that to deny First Amendment protections to employers who may have unsuccessfully, but not unreasonably, petitioned courts for such redress not only chills employers' right of access to courts, but also disrupts the balance which Congress has established under the National Labor Relations Act ("NLRA" or "the Act") among employers, unions, and employees.

In sum, because the Chamber and ABC believe that the same constitutional standard should be applied to employer litigants under the NLRA as is applied to other entities in other legal contexts, they submit this brief *amici curiae* to urge that the Court reverse the decision below and make clear that the objective standard articulated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), applies to employers who may file losing, but not baseless, lawsuits.

SUMMARY OF THE CASE

United States Steel and a Korean company established a joint venture that contracted with BE&K and its partner, Eichlay Constructors, Inc., to modernize a steel mill in Pittsburgh, California. Because BE&K was a non-union contractor, a group of local unions undertook a series of actions against BE&K and the steel mill owners. These union activities included the initiation of more than 35 lawsuits in state and federal court. In response, BE&K and the mill owners sued the unions in federal district court asserting, *inter alia*, violations of Section 303 of the Labor Management Relations Act. The district court granted partial summary

judgment against the plaintiffs in the latter suit, and they, in turn, amended their complaint to assert, *inter alia*, Sherman Act violations predicated on allegations that the unions had unlawfully conspired with non-labor entities. Ultimately, the district court, after dismissing all other claims, permitted limited discovery on the conspiracy allegations. Then, because the BE&K plaintiffs could not adduce evidence in support of the conspiracy allegations, they, too, were dismissed by the district court.

On appeal, the Court of Appeals for Ninth Circuit upheld the district court's dismissal action. In so doing, it affirmed the district court's dismissal of the antitrust claims against the unions, but in that respect nonetheless noted that "fifteen of the twenty-nine [state] lawsuits alleged by BE&K as part of the pattern of fillings 'without regard to the merits' have proven successful." *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994). Because of the latter finding, the Ninth Circuit concluded that BE&K had not established "the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.*

The National Labor Relations Board's ("NLRB" or "the Board") General Counsel then processed an unfair labor practice proceeding against BE&K, alleging that BE&K's federal court suit against the unions violated Section 8(a)(1) of the National Labor Relations Act; this, on the ground that BE&K, by filing a meritless lawsuit against the unions in the district court, had retaliated against the unions and their members in violation of the Act's Section 8(a)(1). After a hearing, the NLRB upheld the complaint against BE&K. *See BE&K Construction Company*, 329 NLRB 717 (1999), reproduced in the Petition For Writ of Certiorari herein ("Pet. App.").

The Court of Appeals for the Sixth Circuit, although recognizing that BE&K's district court lawsuit was not objectively

baseless, ruled that this Court's decision in *Professional Real Estate Investors, Inc.*, 508 U.S. 49 (1993), was not controlling. Instead the Sixth Circuit, relying on this Court's earlier decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), concluded that the NLRB's finding against BE&K was correct. *BE&K Construction Company v. NLRB*, 246 F.3d 619 (6th Cir. 2001).

SUMMARY OF THE ARGUMENT

The right to petition the government for the redress of grievances is an ancient right. Its origin can be traced to the *Magna Carta*; documents of this country's original colonies acknowledge the right's existence; the right is embedded in the First Amendment to the Constitution; and it is an essential part of this Court's basic jurisprudence. The Court has given expression to the right by making it clear that persons cannot be restrained from requesting specific actions by the legislative and executive branches of the government; and in *Noerr-Pennington*, it has decreed that, except where the judicial process may be corrupted by, *inter alia*, baseless lawsuits, the people should have free and unlimited access to the courts.

In 1978, in *Christiansburg Garment*, the Court, addressing the petitioning right, defined a baseless lawsuit as one that is "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case." In 1983, in *Bill Johnson's*, the Court, again interpreting that right, ruled that only where a civil suit brought in a state court is "baseless" may the NLRB enjoin, as an unfair labor practice, the suit's continuation. And most recently, in 1993, in *Professional Real Estate Investors*, the Court set forth a two-part test for determining whether a lawsuit is "baseless" and therefore outside the right of protection.

The decisions below misconstrued *Bill Johnson's*, failed to apply the *Professional Real Estate Investors* test, and

erroneously determined that *Noerr-Pennington* did not apply to failed lawsuits brought by employers in labor relations matters. Those decisions, therefore, truncate employers' petitioning right as set forth in the First Amendment and ignore this Court's comprehensive jurisprudence.

The decisions below also undermine important national and state policies and interests, such as those set forth in the federal antitrust laws and in state laws dealing with property matters and slander and libel. Because the right to petition the courts is otherwise applicable to all but baseless lawsuits, those decisions deny to one group—employers—the very protections that this Court has held essential under the Constitution. Further, the denial of the petitioning right not only hinders the judicial development of rules governing new forms of competition, it also disturbs the labor-management balance set forth by Congress in the NLRA.

ARGUMENT

I. THE COURT'S JURISPRUDENCE, OF WHICH BOTH *BILL JOHNSON'S* AND *PROFESSIONAL REAL ESTATE INVESTORS* ARE SIGNIFICANT PARTS, FIRMLY ESTABLISHES THE RIGHT TO PETITION FOR JUDICIAL RELIEF.

"The right of petitioning is an ancient right." [2] It was recognized in England in events leading to the *Magna Carta* in 1215 and in the Petition of Right of 1628. It was first codified in the *Body of Liberties* adopted by the Assembly of the Massachusetts Bay Colony in 1642, was given classical expression in the Virginia Declaration of Rights, and was made part of the First Amendment to the Constitution of the United States: "Congress shall make no law * * * abridging

[2] N. B. Smith, *"Shall Make No Law Abridging. . .": An Analysis of The Neglected, But Near Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1153 (1986).

the freedom of speech, or the press, or the right of people peaceably to assemble, or petition the Government for redress of grievances." [3]

The right to petition is an essential part of this Court's basic jurisprudence. In *Thomas v. Collins*, 323 U.S. 516, 530 (1945), the Court recognized that "[i]t was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights * * *." [4]

In 1961, the Court addressed an antitrust challenge to a lobbying and publicity campaign waged, *inter alia*, by Eastern Railroads, an association of railroad presidents and a public relations firm. Because lobbying and speech "raise[d] important constitutional questions," the Court held that Congress did not intend the Sherman Act to prohibit persons from "associating together in an attempt to persuade the legislature or the executive" to foster a restraint of trade. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-138 (1961). The Court stated that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138. The Court warned, however, in *Noerr* that the petitioning right did not extend to "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor * * *." *Id.* at 144.

[3] *See generally*, N.B. Smith, *supra* note 2, at 1153-1175.

[4] The Court also declared in *Collins* that the "[c]hoice on that border" where "the individual's freedom ends and the State's power begins" is always delicate, "perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." 323 U.S. at 530.

Four years later, in 1965, the Court extended the *Noerr* protection, *supra*, to lobbying efforts designed to influence executive officials performing commercial and political duties. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). Then in 1972, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court extended the Right to Petition recognized in *Pennington* to litigation, saying: "The right of access to the courts is indeed but one aspect of the right of petition." 404 U.S. at 510. But the right to judicial access, the Court explained, did not extend to "illegal and reprehensible practice[s] which may corrupt the . . . judicial process[]," 404 U.S. at 513, or to actions intended to deter the "'free and unlimited' access to the . . . courts." 404 U.S. at 515.

The Court, in 1978, next addressed the petitioning right in the context of Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k)—a provision that, *inter alia*, allows the "prevailing party" to recover "reasonable attorney's fees." Affirming the decisions below, which had denied such fees to a successful defendant, the Court said that an automatic granting of attorney's fees to a prevailing defendant would chill suits to vindicate rights created by Title VII. It followed, the Court said, that attorney's fees should be allowed to prevailing defendants only when a suit was "meritless," that is, "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case . . . ." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

Three years later, in 1983, the Court interpreted the right to petition the court as limiting the NLRB's ability to enjoin an ongoing employer lawsuit brought against its employees. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). After a waitress filed an unfair labor practice charge with the NLRB alleging that she had been fired for engaging in an activity protected by the NLRA, and because she had, with co-workers, picketed and handbilled the restaurant, the restaurant sued in state court, alleging that the picketers had

harassed customers, blocked access, threatened public safety, and libeled the restaurant. While the restaurant's suit was still pending, the NLRB found that its suit was without basis in law or fact, and had been instituted against the employees' protected concerted activity, and, therefore, violated Section 8(a)(1) of the Act. On this basis, the Board ordered the restaurant to withdraw its state court complaint, *Bill Johnson's Restaurants, Inc.*, 249 NLRB 155 (1980), and the Court of Appeals affirmed. *Bill Johnson's Restaurants, Inc. v. NLRB*, 660 F.2d 1335 (9th Cir. 1981). Addressing the single question whether the NLRB may issue a cease-and-desist order to halt the prosecution of a state-court civil suit brought by an employer to retaliate against employees for exercising federally protected labor rights, this Court held that the NLRB could not preempt a state court and substitute its credibility determinations for the state court's, and that the NLRB could enjoin a state court lawsuit as an unfair labor practice only if the state court suit were "baseless."

Finally, in 1993, the Court held that an objective test must be used to determine whether a lawsuit was baseless, and thus not entitled to the petitioning right. To so determine, the Court established a two-part test: "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and then "[o]nly if [the] challenged litigation is objectively meritless, may a court examine the litigant's subjective motivation." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61 (1993).

In sum, over a period of 40 years the Court has developed a comprehensive jurisprudence that protects the fundamental right to petition courts for redress. In interpreting statutes, the Court has presumed that Congress did not intend to violate this fundamental right, and it has also recognized the potential danger of corrupting or blocking the system through the filing of baseless lawsuits. In the latter connection, it has

established the "sham" exception which provides that only a limited class of baseless lawsuits are not entitled to the protection of the petitioning right, that class being defined narrowly as suits without basis in law or fact. Further, the Court's jurisprudence in this respect has been applied in cases arising under the antitrust laws, Title VII, and the NLRA.

II. THE DECISIONS BELOW CONSTRUED *BILL JOHNSON'S* IN ISOLATION AND THEREBY MISTAKENLY FAILED TO FOLLOW THE CLEAR DICTATE OF *PROFESSIONAL REAL ESTATE INVESTORS.*

This case addresses a question not decided in *Bill Johnson's*, namely, after adverse disposition of an employer lawsuit on the merits, to what degree does the First Amendment shield that failed exercise of the right to petition? The clear, but erroneous, answer given to the question by the Board and the court below is none whatsoever.

The decisions below, relying for the most part on *Bill Johnson's*, would limit *Noerr-Pennington* to antitrust claims and would deny First Amendment protection to failed lawsuits brought by employers in labor relations matters. Here, the Board concluded that BE&K's challenge to the multiple lawsuits brought by the unions failed because BE&K did not show that those lawsuits fell within the "sham" exception to *Noerr-Pennington*. The Board next held that the issue presented should be resolved by considering only *Bill Johnson's* and that *Noerr-Pennington* did not otherwise apply to a failed employer lawsuit. Significantly, too, the Board denigrated the Court's holding in *Professional Real Estate Investors*, saying that "even if an employer had a 'reasonable basis' for bringing the suit, the suit may still be found unlawful . . . [where] the Board finds that it brought the suit out of a desire to retaliate against protected activity. . . . The issue here, therefore, is not whether the Respondent's suit

lacked a reasonable basis, but whether it lacked merit (and, if it lacked merit, whether it was filed with a motive to retailiate against the Unions for engaging in protected conduct)." 329 NLRB 717, 721-722 (Pet. App. 43A-44A). Further, the Board deemed irrelevant BE&K's subjective good faith or the existence of objective good cause for bringing the suit, saying: "The Respondent's mistaken belief that the Unions' actions were unlawful, even assuming that it had a reasonable basis and was held in good faith, is not a defense to a finding that its suit was unlawful if, as we find, the suit lacked merit and was filed with retaliatory motive." 329 NLRB at 727 n.58 (Pet. App. 60A n.62). Thus, in essence, because BE&K had lost its suit, the Board bypassed any claim of constitutional "right" and directly addressed the elements of the unfair labor practice charge.

Affirming the Board, the Sixth Circuit below erroneously followed the Board's reading of *Bill Johnson's* as denying any constitutional protection to a failed lawsuit. It similarly dismissed as inapposite this Court's holding in *Professional Real Estate Investors*, stating that where "the judicial branch of the government had already determined that BE&K's claims against the unions were unmeritorious or dismissed, evidence of a simple retaliatory motive would suffice to adjudge the company guilty of committing an unfair labor practice." 246 F.3d at 628.

The decisions below thus simplistically reduce *Professional Real Estate Investors'* two step analysis, *supra*, to one step by not addressing the constitutional question whether BE&K's lawsuit was "objectively meritless" and by considering only that BE&K's lawsuit had been unsuccessful.

The language in *Bill Johnson's* relating to an underlying case decided adversely to an employer can be read in two different ways. It can be read, as the Board and the Sixth

Circuit read it, as creating a unique exception to the Court's First Amendment jurisprudence—that is, failed employer suits are "meritless," and meritless cases are unprotected insofar as subsequent employee or union claims are made that the suits had a retaliatory purpose; [5] or it can be read as setting forth dicta involving a factual situation in which an administrative law judge had already determined that the employer's suit lacked "a reasonable basis." Even then, this Court's language "may find" or "may conclude" in *Bill Johnson's* would indicate something other than an automatic finding of an unfair labor practice by a losing employer litigant. Moreover, the frequent references in *Bill Johnson's* to the development of the petitioning privilege in antitrust cases suggest not that the Court intended to limit the Right of

[5] The Sixth, District of Columbia, Second and Ninth Circuits join in restricting, post-dismissal, employer petitioning right, but they do not agree either as to the extent of the restriction or the reach of *Noerr-Pennington*. The Second Circuit has expressed its concern with an automatic denial of the petitioning privilege, *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992), and the Sixth Circuit has, in this case, stated that the losing employer lost "*some* of its First Amendment protection." 246 F.3d at 629 (emphasis added). Similarly, the Sixth Circuit has restricted the application of *Professional Real Estate Investors* and *Noerr-Pennington* to antitrust cases, 246 F.3d at 629, but the Ninth Circuit has applied "'the First Amendment rationale of the Noerr-Pennington doctrine' broadly to claims not involving antitrust law," and has realistically acknowledged that "it is the NLRA cases that we treat differently from all others with respect to the Noerr-Pennington 'sham' exception. The reason is simple. The First Amendment rights of employers 'in the context of [the] labor relations setting' are limited to an extent that would rarely, if ever, be tolerated in other contexts." *White v. Lee*, 227 F.3d 1214, 1236 (9th Cir. 2000). The D.C. Circuit acknowledged a possible tension between *Bill Johnson's* and *Professional Real Estate Investors* and stated, hopefully: "Perhaps the Supreme Court will one day create a uniform standard for sham litigation governing both NLRA and non-NLRA cases (or explain why the First Amendment protects erring litigants less in the NLRA context than others). . . ." *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32 (D.C. Cir.), *cert. denied*, 151 L.Ed.2d 376 (2001).

Petition in NLRA cases, but rather to maintain the protection except for "meritless" lawsuits. The analysis and language in *Bill Johnson's* paralleled that in the *Noerr-Pennington* cases, which addressed antitrust and Title VII matters. The Court made clear in *Bill Johnson's* that it used the antitrust cases by analogy, 444 U.S. at 744, and, further, it gave no indication in *Bill Johnson's* that its reference to the key term "meritless" in the latter case ("not prevailing") had a meaning different from the earlier careful usage in *Christiansburg Garment* ("groundless or without foundation, rather than simply that the plaintiff has lost its case"). Accordingly, *Bill Johnson's* offers no policy reason for according employers in an NLRA context lesser protection than is accorded to litigants in other contexts. Nor did the Court in *Bill Johnson's* set forth any suggestion that the risk of employee intimidation should be given greater weight than is accorded to parties in other contexts, or that the risk of intimidation of employees is less when suits are *pending* against them than when they stand vindicated by dismissal.[6]

In sum, the Court in *Professional Real Estate Investors* referred to *Bill Johnson's* without any indication that the latter was not within the case law development of *Noerr-Pennington*, and it set forth no indication that *Bill Johnson's* represented a different application of the petition-ing right. Thus, eliminating or truncating the petitioning right in the one area of the law concerning labor relations stands as a sharp departure from the otherwise consistent case law development. Finally, nothing in the text or history of the First Amendment or the NLRA supports such a strained

[6] As for the matter of the intimidation of employees, the Board has noted in a different context that employees are "mature individuals who are capable of recognizing . . . propaganda for what it is and discounting it." *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 132 (1982). *See also Cross Pointe Paper Corp.*, 330 NLRB No. 101 (2000) (reiterating the Board's belief that "employees are capable of recognizing campaign propaganda for what it is and discounting it").

exception to the Right of Petition. And because the outcome of litigation is always uncertain, regardless of the context in which it occurs, no good reasons exist for treating employers, employees, or unions differently from other litigants.

III. THE DECISIONS BELOW DEPRIVE EMPLOYERS INVOLVED IN LABOR DISPUTES OF THE RIGHT OF PETITION AVAILABLE TO UNIONS AND OTHER LITIGANTS AND THEREBY UNDERMINE IMPORTANT NATIONAL AND STATE INTERESTS.

Litigation is risky, especially for plaintiffs who bear the primary burden of proof. *See USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994). Also, *Christiansburg Garment* makes clear that even a suit's dismissal is not to be equated with the concept of "meritless." 434 U.S. at 421-422. Moreover, the effect of a blanket denial of petitioning protection to employer actions against unions has the effect of undermining national policy and recognized state interests.

In 1947, Congress gave expression to the national policy by prohibiting unions from engaging in certain secondary conduct and by creating a private cause of action for "whoever shall be injured in his business or property" as a result of prohibited secondary action, and by making labor unions liable for damages as a result of actions that also constitute union unfair labor practices. Labor-Management Relations Act of 1947, § 303(b), 29 U.S.C. § 187(b). Congress thereby recognized, albeit indirectly, the importance of employer access to courts for the vindication of statutory claims.

The antitrust laws, and especially the Sherman Act, are the "*Magna Carta*" of free enterprise. As such, they are "as important to the preservation of economic freedom . . . as the Bill of Rights is to the protection of personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610

(1972). *See also Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).[7] Under such laws, antitrust plaintiffs are private attorneys general vindicating important public rights and are entitled to recover their costs and attorneys' fees. 15 U.S.C. §15. Because of standing limitations and the indirect purchaser doctrine, many antitrust claims against unions can be brought only by persons directly affected thereby, which is often an employer. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). But unless employers are able to pursue such claims without concern about being charged with a resulting unfair labor practice charge if the claim is unsuccessful, public harm could continue unabated; and few employers lacking smoking gun evidence would undertake an already difficult antitrust case at the risk of also paying a union's attorneys' fees.[8]

As for state interests, *Bill Johnson's* recognized that states too have valid interests in protecting the security and property of their citizens, and the Court interpreted the NLRA to accommodate those interests. *See* 461 U.S. at 741-742. These interests include holding unions responsible for damage to property and for slander and libel. Thus, the decisions below, in a misguided attempt to protect unions and employees, have thwarted the vindication of these recognized state interests.

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[7] The Clayton and Norris-LaGuardia Acts, 15 U.S.C. §§ 18 *et seq.* and 29 U.S.C. §§ 101-115, respectively, create a limited statutory immunity for labor unions, which they lose when they combine with non-labor groups, *H.A. Artist & Associates, Inc. v. Actors' Equity Association*, 451 U.S. 704 (1981), or when they engage in conduct not related to wages, hours or working conditions that directly affects competition in the product market. *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965).

[8] Unions lose their statutory exemption when they conspire with non-labor groups, but proof of collusion is exactly the kind of proof that is not readily available. *E.g., Esco Corp. v. United States*, 340 F.2d 1000, 1004 (9th Cir. 1965) ("[I]t is well recognized that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence * * *.")

In addition to undermining the public interest in enforcing settled policy, the decisions below thwart the development of the law regarding new union practices. Traditional labor conflict involves handbilling, picketing, elections, and strikes; but strikes and elections are becoming less and less important as unions expand their arsenal of weapons. For example, union opposition to non-union or merit contractors "can take the form of either litigation or intervention in federal, state, or local regulatory and zoning processes." D. J. Durie & M.A. Lamley, *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 CAL. L. REV. 757, 759 (1992). In place of typical remedies, "'unions may try lawsuits, proxy contests and other approaches.'" Karl A. Groskaufmanis, *Proxy Reform and the Brave New World of Investor Relations: Ten Rules of Thumb for the 1990's*, *in* ADVANCED SECURITIES LAW WORKSHOP 1993 (PLI Corp. Law & Practice Course Handbook Series No. B4-7037, 1993) (citation omitted). *See also* S. J. Schwab & R. S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 Mich. L. Rev. 1018 (1998), and Charles R. Perry, *Union Corporate Campaigns* (Univ. of Penn., Wharton School, Major Industrial Research Unit Studies No. 66, 1987). Additionally, union campaigns may involve the target employer's financing entity, customers, suppliers and community; and union litigation has often proved to be a key element, as illustrated by the more than 35 state and federal lawsuits filed by unions and associated entities in the case before this Court. *See USS-POSCO Industries*, 31 F.3d at 811 n. 9.

Each of these tactics raises questions as to its general legality and the legality of its use in specific factual situations; and the approved forum for resolving legality has traditionally been the courts. Accordingly, to limit the employers' right of petition by penalizing failed challenges to legality thwarts the development of the law.

Further, the decisions below have the effect of altering the balance of resources available to labor and employers. *Noerr-Pennington* provides extremely broad protection for litigation, often initiatory, brought by unions and their associates even when it fails. Under the decisions below, however, failed employer suits are, by contrast, subject to serious cost and unfair labor practice penalties. The Board's action here parallels that taken by an earlier Board which denied employers the use of the lockout while protecting unions' right to strike. The Court rejected the Board's action and should do so here. *See American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965).

In summary, denying constitutional protection to failed employer suits has a substantial chilling effect and the consequences go far beyond the immediate employer. Forgetting that unions "must assume ordinary responsibilities," *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 63 (1966), the decisions below free unions from specific congressional strictures and ignore important state interests in protecting the property, person and reputation of its citizens, limit the development of the law governing secondary activity, and alter the balance of forces established by Congress.

CONCLUSION

For the foregoing reasons, the Court should state that this case is controlled not by *Bill Johnson's*, but by *Real Estate Professional Investors*. Accordingly, the Court should reverse the judgment of the court below.

Respectfully submitted,

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